

U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)



Issue Date: 27 May 2004

CASE NO.: 2003-AIR-00038

In the Matter of

RAY GARY

Complainant

v.

CHAUTAUQUA AIRLINES

Respondent

For Complainant: Aurel A. Villari, Esquire

For Respondent: IceMiller
David J. Carr, Esquire
Kerry S. Martin, Esquire

Before: Janice K. Bullard
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“the Act”), as implemented by 29 C.F.R. 1979 (2002). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (FAA) or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a).

BACKGROUND

A. Procedural History

On April 16, 2003, Ray Gary (“Complainant”) filed a complaint with the U.S. Department of Labor’s Occupational Safety and Health Administration (“OSHA”), alleging that Chautauqua Airlines (“Respondent”) had unlawfully discharged him in violation of Section 42121 of the Act. After an investigation of the complaint, on June 13, 2003, the Regional

Administrator for OSHA issued a determination that the investigation disclosed no violation of the Act's employee protection provisions. On June 18, 2003, Complainant objected to the findings and requested an administrative hearing pursuant to 49 U.S.C. § 42121(b)(2)(A).

A Notice of Hearing dated July 14, 2003 was issued setting hearing for October 15 and 16, 2003 in Cranford, New Jersey. On September 10, 2003, Respondent filed a Motion for Summary Decision, which was denied by Order issued October 2, 2003. On October 3, 2003, Respondent filed Motions for Continuance and to Compel Discovery after Complainant failed to appear at a properly noticed and scheduled deposition. By Order issued October 7, 2003, Complainant was directed to appear at a deposition to be scheduled before the hearing date. Respondent's motion for continuance and sanctions was denied. Although Complainant failed to appear at a scheduled deposition, I denied Respondent's renewed motion for continuance and sanctions, in part because Complainant had been acting pro se until only days before the hearing. Complainant's counsel was prepared to go forward.

My decision in this case is based on the sworn testimony presented at the hearing and the following evidence admitted into evidence: ALJX 1; CX 1; CX 3 through CX 5; RX 1 through RX 17.¹ In addition to the evidence received into the record at the hearing, I admitted into the record documents that were submitted with Respondent's Motion for Summary Judgment and Complainant's Response to the Motion that were not additionally introduced during the hearing. Those documents are identified as CX-A through CX -D and as RX-A through RX-C. Although Respondent has not contested the veracity of Complainant's assertion that he filed a lawsuit against his prior employer that addressed his alleged whistle blowing activity, I undertook a search of the Westlaw© database for New Jersey court filings, which disclosed that on April 29, 2002, Plaintiff Ray Gary brought civil action L003643 02 against Air Group Inc. in Superior Court, Bergen County, NJ. This action was apparently transferred to United States District Court, Essex County, NJ on May 29, 2002, as evidenced by the docket noting "civil action 02-CV-02589, civil rights case of Ray Gary v. The Air Group, Inc." The database reflects another civil rights case filed on December 3, 2003, in United States District Court by Plaintiff Ray Gary against Defendant The Air Group, civil action No. 03-CV-05844. I have identified a copy of the docket report as ALJX-1, and shall provide a copy to the parties with this Decision and Order.

At the hearing, Complainant identified as CX-2 an advertisement for pilots that he copied from Respondent's website, and Respondent acknowledged familiarity with the content of the document. TR. at p. 35. The undersigned allowed Complainant to keep the document and asked him to provide a copy before the close of the record. Complainant has not provided a copy. As this document was generated by Respondent, and no objection was raised regarding its authenticity, its absence from the record is not prejudicial to Respondent. Because the document merely demonstrates that Respondent was seeking to hire pilots, and because Complainant was hired by Respondent, I find that its absence from the record does not prejudice Complainant. I conclude that CX-2 merely serves as demonstrative evidence that Respondent had pilot vacancies, an issue not in dispute. Similarly, Complainant proffered and discussed CX-6, 7 and 8 at the hearing and agreed to provide copies thereof to me and to counsel for Respondent. See, Tr. at 40; 345-347. I did not receive copies of those documents to admit to the record. These

¹ Complainant's exhibits are identified as "CX"; Respondent's exhibits are identified as "RX" and I have added one exhibit identified as "ALJX-1". References to the transcript of the hearing are referred to herein as "TR".

records were described as study aids independently compiled by Complainant in conjunction with his training for his position as pilot with the Respondent. Id. I conclude that these documents serve to augment Complainant's testimony regarding that preparation and therefore constitute demonstrative evidence that is not material to any disputed fact or issue in this matter. Respondent was provided the opportunity to inspect the documents and cross-examine Complainant about them. The records are not material to my determination, and their absence from the record does not prejudice either Complainant or Respondent.

Complainant raised an objection to the admission of documents pertaining to pilot trainees' performance. I overruled the objection and admitted the records as business records, under 803(6) of the Federal Rules of Evidence. However, I sustained the objection to the "hearsay within hearsay" content of those records, and found them admissible only to show the state of mind of the witness who relied upon the records for personnel matters. I allowed Respondent's witness Gary Santos to testify about the records, but that testimony has probative value only so far as it reflects that the witness relied upon the records in making personnel decisions. Mr. Santos was not competent to testify about the truth or validity of the content of the training evaluations. The content of the records is unreliable and excluded pursuant to 802 of the Federal Rules of Evidence. The individuals who authored the records at issue were listed by Respondent as witnesses, but were not made available at the hearing. I denied Respondent's request for post-hearing evidence from those witnesses regarding the trainee performance records, as Respondent had put both Complainant and me on notice that they would appear and testify.

Post-hearing briefs were scheduled to be filed December 20, 2003. Complainant moved for an extension of time within which to file his brief, which I granted. Respondent filed its brief on December 19, 2003, and Complainant filed his brief on January 12, 2004.

B. Complainant's Statement of the Case

Complainant alleges that his employment with Respondent was terminated because Respondent learned that he had filed a civil action against a prior employer, The Air Group, Inc. ("Air Group"), in which he alleged that Air Group had violated his civil rights by terminating him after he expressed his concern regarding the competency of another pilot. Complainant contends that Respondent knew he had brought the suit because he told Ms. Moseley that he had, and because he believed that it was divulged to Respondent during his background investigation. In support of his contention, Complainant points to the nexus between when his background material was forwarded to Respondent on or about January 10, 2003 and his termination on January 17, 2003.

C. Respondent's Statement of the Case

Respondent contends that it first learned of Complainant's civil action when he filed the instant complaint with the U.S. Department of Labor. Respondent maintains that Complainant was terminated because of his deficient performance during training.

ISSUES

1. Whether Complainant engaged in activity protected under the Act.
2. If Complainant engaged in protected activity, was Respondent aware of this activity and did this awareness contribute to Respondent's decision to terminate Complainant's employment?
3. If Complainant's protected activity is found to have contributed to his termination, has Respondent demonstrated by clear and convincing evidence that it would have terminated Complainant even in the absence of the protected activity?

SUMMARY OF THE EVIDENCE

A. Exhibits

ALJX-1

Westlaw record of case L 003643 02, filed on April 29, 2002 in Superior Court, Bergen County, NJ, by Ray Gary against Air Group Inc.; and Westlaw record of civil actions 02-CV-02589 and 03-CV-05844, filed on May 29, 2002 and December 3, 2003, respectively, in U.S. District Court by Plaintiff Ray Gary against The Air Group, Inc.

CX-1 At the hearing, Complainant identified as his first exhibit documents pertaining to the background investigation conducted by Respondent. Complainant indicated that he would rely upon Respondent's documents and did not subsequently submit a separate copy of that investigation's documents. TR. at pp. 31-32. Accordingly, I have adopted pertinent portions of Respondent's RX-1 as CX-1.

CX-3 Complainant's data base comparing his qualifications with other newly hired pilots for Respondent
(CX-A)

CX-4 Letter dated September 23, 2003 from Robert Sindoni
(CX-C)

CX-5 Undated letter from Neal H. Rotenberg
(CX-D)

CX-B Undated letter from Victor W. Villari, D.V.M.

RX-1 Complainant's application for employment with Respondent dated November 12, 2002. The application includes the documents gathered by Stadler & Company that pertain to Complainant's background investigation. Those documents are described as follows:

- (1) U.S. Department of Transportation Federal Aviation Administration's (FAA) response to request for search of accidents and incidents involving Complainant
- (2) Search results from Ohio State Bureau of Motor Vehicles regarding Complainant's driving record
- (3) FAA's response to request under section 502 of Pilot Records Improvement Act regarding Complainant's medical and airman certificates and ratings, and limitations thereto
- (4) Consent releases and requests for employment records with previous employers, including Metro Aviation, Spartan Aviation, Skyline Aviation, Mac Dan Aviation (M.D. Aeronautical Corp.), Sindoni and Associates, The Air Group
- (5) Response from Sindoni and Associates
- (6) Response from Mac Dan Aviation (M.D. Aeronautical Corp.)
- (7) Response from The Air Group and documents pertaining to Complainant's training and employment with that employer
- (8) Wonderlic Personnel Test taken by Complainant on November 12, 2002
- (9) Complainant's W-4 for employment with Respondent dated 12-4-02
- (10) Complainant's identification of criminal activity
- (11) Complainant's resume
- (12) Copies of Complainant's medical certificate and FAA and SimuFlite rating certificates
- (13) Complainant's instrument test taken on November 12, 2002
- (14) Complainant's health insurance benefits enrollment application dated December 4, 2002
- (15) Complainant's life insurance benefit form

RX-2 Pilot Flight Training Record Form (PTF-13) for Ray Gary for simulations conducted on January 13, 20003, January 14, 2003, January 15, 2003 and January 16, 2003

RX-3 Systems Ground Training Form (PTF-06) for Ray Gary and Murphy for January 9, 2003

RX-4 e-mail from Brent Buzzell to GSantos@FlyChautauqua sent January 15, 2003

RX-5 Duplicate record of The Air Group's response to Stadler & Co.'s request for information about Complainant's employment with that employment (See, RX-1)

RX-6 Personnel/Payroll Action Form for Complainant indicating "Resignation-reason Failed to complete training"

RX-7 Airman Proficiency Check 121.441 (Form PTF 10); Pilot Flight Training Record (Form PTF-13) for Airman George H. Hanson

RX-8

- (1) Pilot Flight Training Record (Form PTF-13) for Ivy Rivera
- (2) two (2) e-mail messages from Brent Buzzell to LBillups@FlyChautauqua sent December 6, 2002

- (3) Statement of December 5, 2002 from Kenneth C. Juergens addressed to “Brent” discussing Ms. Rivera’s performance during simulator training
- RX-9 Two (2) Airman Proficiency Check 121.441 Forms (Form PTF 10); Additional Training (Form PTF-9); Pilot Flight Training Record (Forms PTF-13A, 13B) for Airman Michael Lyndaker
- RX-10
- (1) Pilot Flight Training Record (Forms PTF-13, 13A, 13 B) for Airman Chris Miller
 - (2) Letter dated April 23, 2003 from Chris Miller to Mr. Larry D. Billups
 - (3) Letter dated April 23, 2003 from Chris Miller to Mr. Chip White
 - (4) Letter dated April 23, 2003 from Chris Miller to Mr. Ron Santos
- RX-11 Two (2) Airman Proficiency Check 121.441 Forms (Form PTF 10); Additional Training (Form PTF-9); Pilot Flight Training Record (Forms PTF-13A, 13B) for Airman Brian Lee; Undated correspondence from Mark Paggie to “Don” discussing Mr. Lee’s performance
- RX-12 Airman Proficiency Check 121.441 Form (Form PTF 10); Pilot Flight Training Record (Forms PTF-13, 13A, 13B) for Airman Jennifer Berns
- RX-13 Line Oriented Flight Training Form (Form PTF 17); Pilot Flight Training Record (Forms PTF-13, 13A, 13B) for Airman John Zier
- RX-14 Line Oriented Flight Training Form (Form PTF 17); Pilot Flight Training Record (Forms PTF-13, 13A, 13B) for Airman Edward Fink; e-mail from Brent Buzzell to GSantos@FlyChautauqua dated January 20, 2003, relating to Mr. Fink’s performance
- RX-15 Line Oriented Flight Training Form (Form PTF 17); Pilot Flight Training Record (Forms PTF-13, 13A, 13B) for Airman Thomas Murphy
- RX-16 Pilot Flight Training Record (Forms PTF-13, 13A, 13B) for Airman Amy Dodgen; e-mail from Brent Buzzell to GSantos@FlyChautauqua dated January 15, 2003, relating to Ms. Dodgen’s performance
- RX-17 Checklist used during Respondent’s Personal Interview of Complainant
- RX-A Letter of June 13, 2003 to Complainant from U.S. Department of Labor Occupational Safety and Health Administration reporting Secretary’s Findings after Investigation
- RX-B Affidavit of Gary Santos
- RX-C Pilot flight training records for A. Hitchcock

B. Testimony

Complainant Ray Gary

Mr. Gary testified that he set out to become a commercial aircraft pilot, and undertook his own training at his own expense beginning in his earlier twenties. Tr. at 54. He first completed the necessary training to qualify for a private pilot's license, which he said permitted him to fly aircraft for his own pleasure, and then continued training to attain the necessary certificates to qualify as a commercial pilot. Tr. at 56-60. He achieved his instrument rating and then accrued the necessary hours and passed the required tests to earn his commercial pilot's license. Id. At that point, Mr. Gary was qualified as a pilot for hire. Tr. at 60. In order to enhance his marketability as a professional pilot, Complainant completed the necessary requirements to secure his multi-engine rating and flight instructor certificate. Tr. at 62-63. He worked for a time as a flight instructor, and secured a certified instrument flight instructor rating, which qualified him to teach individuals to fly using only instruments. Tr. at 65. He continued his training, and earned a multi-engine instructor rating. Id. at 65. Mr. Gary continued to accumulate the necessary flight hours and training to qualify for his airline transport pilot's license, which qualified him to fly aircraft that transport passengers. Id. at 67 – 69. Complainant piloted turbo-prop planes as captain, and in October, 2000, underwent training that qualified him to fly a jet. Id. at 71.

Complainant's first jet rating was for a small plane that held between 8 and 10 passengers. Tr. at 73. He continued to accumulate air time, and was awarded a Gold Seal Flight Instructor rating and a ground instructor rating. Tr. at 73. Claimant testified that he has never been involved in an accident or incident while flying, nor has he been cited for any FAA violation. Tr. at 74. He characterized an incident as "an aberration in the air traffic control system that creates problems for other traffic that affects safety in the air traffic control system, anything that causes something to go out of the norm and affects the whole system..." Tr. at 75.

Complainant has worked as a pilot in a variety of settings and aircraft. He flew a Beach Craft King Air in 1989 for an airline that went out of business, and then flew the same plane for a company that provided on demand charter service. Tr. at 76-77. He continued to work as a flight instructor and flew charters until he secured a position with The Air Group in the summer of 2000. Tr. at 82. He was hired as a pilot and trained to fly a particular plane, but said that the company did not provide him the opportunity to fly the plane. Tr. at 83. The Complainant testified that he was terminated from his employment with The Air Group in July 2001, and described the circumstances underlying the termination in this fashion:

The airplane had a previous captain. The captain realizing that the airplane was not flying, he quit -- terminated his own -- resigned from the company. Subsequently, the company waited for an extensive period of time before they were able to employ a second captain. This second captain apparently it came to my knowledge when I -- they asked me to work with him for a week, which I found very strange. Being a first officer, I was an entry level pilot on that airplane, and I was an assistant to the captain, not the other way around. So I ended up working with this individual. I found his grasp of the airplane systems and just the air space in the New York area and regulations very weak. I brought this to the attention of the chief pilot, who is our immediate supervisor, and he

said he would check into that. My concern was, I'm concerned for my safety, the safety of passengers in hand and just regulations in general. I didn't want to create any kind of violations...Their response was this approximately -- I called them in California, which is where the company is based out of, around 12 o'clock Eastern Time. They -- he said let me get back to you. He called me back approximately 4 or 5 o'clock in the afternoon. It was somewhere around there. And he said based on our employment agreement, I am terminating you from our contract. And I immediately asked them, I said could you tell me why you are taking such an action? And he said, we cannot discuss it. He said if you could, return your materials, your manual, your identification card, your uniforms and all -- everything you have which is the property of us, belongs to us to our -- Park, New Jersey office, and that was it.

Tr. at 84-85.

Complainant testified that after he was terminated he consulted several attorneys, and upon their advice, filed a complaint in the Superior Court of New Jersey, alleging that his termination had been in retaliation for reporting safety issues that he had perceived when working with another pilot. Tr. at 86-87. Mr. Gary asserted that Air Group violated the "Conscientious Employee Protection Act" when it terminated him. Id. Complainant explained that the case was erroneously filed in state court, and was removed to federal court, where it was dismissed on grounds that are currently under appeal. Tr. at 89. Mr. Gary believed that he initiated his formal legal action in January, 2002.²

Complainant described his contacts with Respondent regarding employment opportunities as a pilot with Chautauqua. He stated that he was interviewed by Rita Moseley and another representative of the company at their offices in Indianapolis in July 2001. Tr. at 90-93. Complainant testified that after his interview, he was offered a position as co-pilot but declined the offer because of a family medical emergency. Tr. at 92. Complainant testified that the position also was subject to his completion of training on the aircraft he would have been assigned to fly, a Saab 30, which he described as a 34 passenger prop jet aircraft. Tr. at 92-93. Mr. Gary said that he advised Ms. Moseley that he was interested in the position if it were available at a future date, and he called her every few weeks or so after July 2001 to inquire about pilot vacancies. Tr. at 94.

Complainant testified that during the period after he declined Respondent's employment offer until he reapplied in November, 2002, he prepared himself to work for Respondent by familiarizing himself with the type of aircraft that they flew. Tr. at 100-102. He prepared his own training manuals and study guides in his belief that he would be better qualified to work for Respondent if the opportunity arose again. CX-6, 7, 8.

Complainant stated that during his contact with Ms. Moseley in November, 2002, she advised him that he needed to update his employment application with Respondent. Tr. at 98. He traveled to Indianapolis to interview again with Ms. Moseley for the position of co-pilot. Tr.

² ALJX-1

at 98. Complainant testified that during the interview, he advised Ms. Moseley that he had been terminated by The Air Group. Complainant stated:

Towards the end of the interview, basically Ms. Moseley asked me is there -- okay, now that completes the interview, something to that effect, is there anything that you would like to tell us at this time, because just be aware that we check your background towards the end of latter part of your training. And I brought it to her attention that I had this case pending, and that I had been terminated by the Air Group. Her response was basically that we will be in touch and we'll check on it.

Tr. at 108.

Mr. Gary said that he was next contacted by Ms. Moseley four or five days after his interview and offered a position as first officer on the Embraer ERJ 145 aircraft, pending successful completion of Respondent's training program. Id. Complainant recalled leaving for Indianapolis on December 3rd, and attending two weeks of indoctrination training that consisted of being familiarized with Chautauqua Airline's company regulations and procedures. Tr. at 109. Complainant stated that he was tested on the material and passed. Id. He was then given a ticket to travel to St. Louis, Missouri for training that was conducted on behalf of Respondent by Flight Safety International (FSI). Tr. at 110. Mr. Gary estimated that he started that phase of his training in mid-December, 2002. Id.

The training that Complainant underwent in St. Louis consisted of systems training and simulator training. During the systems phase, participants studied the aircraft that they would be expected to fly and then took a test on their knowledge of the plane and its systems. Tr. at 116. Complainant did not receive a passing grade when he first took the test, but he was permitted to retest and passed. Tr. at 117. Complainant then advanced to the simulator phase of training, where he expected to have eight (8) sessions in a simulator, which mimics flying. Tr. at 112; 118. Complainant testified that he believed his instructor in the simulator was Tom Shannon of FSI. Tr. at 112. Gary recalled that after his fourth simulator session, he was advised by his instructor that his basic skills were lacking, and that he would need additional simulator sessions beyond those usually scheduled. Tr. at 120-121. Complainant said that he disagreed with the instructor's evaluation, and called Respondent's Director of Flight Training, Mr. Santos, to discuss his situation. Tr. at 121. In a subsequent conversation by telephone, Mr. Santos advised Complainant that his training was being terminated. Tr. 122. Complainant estimated that this occurred in mid January. Id.

Complainant testified that he asked Mr. Santos to consider providing him the opportunity to prove his competence through an evaluation by a different instructor, consistent with his understanding of what FAA would provide during certifications. Tr. 122-127. In his experience as a flight instructor, he regularly gave trainees such an opportunity. Tr. at 128. Mr. Gary said that Mr. Santos declined to reconsider his decision to terminate his training. Id. Complainant said that he expressed his disbelief that his performance could be perceived as substandard, in consideration of his many certificates and his status as instructor. Id. Complainant described how he compiled information that compared his qualifications with those of other pilots, and concluded that his qualifications exceeded the basic requirements for pilots. Tr. at 135; CX-3. Mr. Gary said that Mr. Santos was unable to provide him with a more specific rationale for his decision other than that his basic skills were lacking. Tr. at 124.

Mr. Gary testified that in addition to completing training, he was required to submit to an investigation of his background, which is required by FAA. Tr. at 139. Complainant stated that the background investigation included inquiries to prior employers and he said that The Air Group was among those employers who answered Respondent's inquiry.³ Tr. at 140; RX-1. Complainant said that The Air Group had indicated on the form returned to Respondent that he had been terminated, and he noted that the materials were dated December 11, 2004. Id.

Complainant testified that he believed he was terminated because Respondent learned of his action with The Air Group. He said he suffered financial losses associated with foregoing employment with other employers while waiting to be hired by Respondent, and then losing the salary he would have earned with Chautauqua. Complainant also noted that his income from his personal business was halved during the time he educated himself about Respondent's aircraft and during his training period. Tr. at 141-144.

Upon cross-examination, Complainant admitted that on the application for employment with Respondent that he prepared (RX-1), he wrote that he was laid off from The Air Group at the expiration of his employment agreement with that employer in December, 2001. Mr. Gary had also written that "Aircraft was removed from line. No work". Tr. at 150. Complainant reiterated that he had advised Ms. Moseley of his lawsuit against The Air Group at the end of his second interview with her: "So I told her, I said basically I have a whistle blowing lawsuit. I've been terminated by The Air Group, and it was -- employment agreement, and they terminated my agreement with them. And she said, we'll be in touch. I'll check into it." Tr. at 154. Complainant admitted that he did not disclose this conversation with Ms. Moseley when he filed his complaint with OSHA. Tr. at 155. Complainant also admitted that he did not disclose this conversation with any filings before me. Tr. at 156. In response to questioning by opposing counsel, Complainant admitted that his first disclosure of this conversation was at the hearing before me:

Q So this testimony regarding Ms. Moseley, is really offered today for the first time in any form, correct?

A Yes.

TR at 156. Complainant admitted that he had no other conversations with any other representative of Respondent about his action against Air Group and his underlying whistle blowing activity:

Q: And we have discussed today in your direct and cross every conversation that you had with Chautauqua Airlines representatives, agents, anyone associated with Chautauqua Airlines regarding your whistle blowing claims against the Air Group, correct?

A I'm sorry. I apologize. Could you repeat the question?

Q Sure. I'd be happy to. You've talked about the conversations with Ms. Moseley, and you --

A I mentioned it to Rosa Moseley.

³ Respondent contracts with another company, Stadler & Company to conduct its background investigations.

Q Yes.

A I didn't talk about it. I mentioned it.

Q You mentioned it, that's fine. But I'm just trying to make sure we've captured the universe. That's the, that's the sum total of your discussions with Chautauqua Airlines employees --

A Yes, yes, that's correct.

Q -- regarding The Air Group whistle blowing claims.

A That's correct, yes.

Tr. at 191. Claimant confirmed that he had not told any Chautauqua representative that he believed he was retaliated against:

Q Just one other question. Is it true that at no time during your employment or termination of your employment did you ever accuse Chautauqua Airlines of retaliating against you for filing a whistle blowing claim against the Air Group; that the first time that you raised that was when you filed your complaint with the Department of Labor?

A I believe that's correct, yes.

Tr. at 196.

Complainant testified regarding letters of recommendation from two individuals who are pilot/owners of aircraft that Complainant has flown. Tr. at 178; CX-4, 5. He also described receiving some of the resource materials for the study guide that he made from pilots who had flown for Respondent. Tr. at 180. Complainant reiterated that he had foregone the opportunity to fly a plane for another employer, and lost money in his business. Tr. at 183.

Rosa Margarita Moseley

Ms. Moseley testified that she has worked for Respondent as a recruiter for five years. Tr. at 210. She is responsible for recruiting all new employees, from mechanics to pilots. Id. Ms. Moseley said that as part of her duties, she reviews all documents pertaining to recruits, including documents relating to background investigations conducted on Respondent's behalf by Stadler and Co ("Stadler"). Tr. at 210-211. Ms. Moseley stated that pursuant to federal law, Respondent must request pilot's employment information going back five years. Tr. at 212. Ms. Moseley stated that her usual practice is to forward information to Stadler about new recruits at about the time they are expected to commence employment with Respondent. Id. She stated that Mr. Gary's background investigation paperwork was returned to her from Stadler before his training ended, and said that the documents indicated that it was returned on January 10, 2003. Tr. at 235; 237.

Ms. Moseley testified that she had no recollection of seeing The Air Group's form that indicated that Complainant had been terminated when the documents were returned to her. Tr. at 242-246. Ms. Moseley testified that she recalled that she reviewed Complainant's background information when it was sent to her by Stadler, but did not see the information from The Air Group that indicated that Mr. Gary was terminated. Tr. at 368. Ms. Moseley stated that she looked at the information and filed it in Complainant's personnel file. Id. She could not recall

reviewing the documents immediately upon their receipt, and she said that depending on her other duties, several weeks may pass before she undertakes a review. She denied requesting any additional information about Complainant from Stadler. Tr. at 246. Although she acknowledged that FAA rules require her to follow up on negative information, she did not see that The Air Group had checked "termination" on Mr. Gary's inquiry. Id. She noted that The Air Group did not send documentation regarding any incidents involving Complainant. Id. She also denied talking to anyone at The Air Group about Mr. Gary's previous employment with that company. Tr. at 213; 246. Ms. Moseley stated that it was standard practice for her to not share information that Stadler provided regarding recruits with Mr. Santos or any other individual associated with training for Chautauqua, and she denied doing so with Mr. Gary's information. Tr. at 218.

Ms. Moseley recalled meeting Mr. Gary for two interviews, and said that she remembered the second interview was less intense than the first because she was familiar with him. Id. Ms. Moseley testified that she was very sure that Complainant said nothing to her during the interview about his litigation against The Air Group, or about a whistleblower action or the New Jersey CEPA statute. Tr. at 214. When asked how she could be so sure, she responded, "I am sure, because if he would have said anything like that, obviously it's out of the ordinary. I would remember such thing, and also I would have stated that on my notes." Tr. at 214. Ms. Moseley explained the significance of RX-17:

A This is my notes I took on the interview with Mr. Ray Gary on November 12th.

Q And is that a copy or is that actually the original?

A This is the original.

Q And what did -- what in fact do those notes tell you?

A Well, I did ask Ray Gary one of my questions that I always ask is have you ever been asked to resign from a job? And what he mentioned about The Air Group is that the contract had expired and they no longer had a flying aircraft for him.

Tr. at 215. Ms. Moseley elaborated:

Q But what -- Ms. Moseley, Rosa, what, if anything, in that document helps you to be certain that Mr. Gary did not discuss whistle blowing and air group litigation and so on?

A Because I would -- write that information on my interview sheet.

Q And are you sure about that or you just think that's so?

A I am sure about that.

Tr. at 216-217.

Ms. Moseley admitted that she had spoken with Complainant on several occasions in addition to her two interviews, but denied that he had disclosed this information to her during any of her conversations with him. Tr. at 217. Ms. Moseley testified that she first learned that Mr. Gary had alleged that he was terminated from Chautauqua in retaliation for whistle blowing activities when he filed his claim with OSHA. Tr. at 218.

Upon cross-examination, Ms. Moseley testified that she estimated having interviewed as many as 450 people during her tenure as recruiter for Respondent. Tr. at 219. She stated that

she made notes during interviews to help her remember individuals, such as the notes she made when interviewing Respondent. Tr. at 221; RX-17. Ms. Moseley stated that she recalled Complainant because he was very friendly, and because she had met him before and talked with him on the phone with some frequency. Tr. at 232-234. She said that she uses the same form when making notes during interviews, but does not consistently emphasize the same information, nor does she always fill out the form completely. Tr. at 221-228. Ms. Moseley maintained that although she does not fill out everything on the form, she would make a note of something an interviewee said about a prior employer. Tr. at 228. Ms. Moseley stated that, in her experience, no recruit, including Complainant, ever mentioned being involved in a whistle blowing action against a prior employer. Tr. at 229.

Gary William Santos

Mr. Santos testified that he has been employed by Respondent as Director of Pilot Training for more than three years. Tr. at 253. He is responsible for overseeing the training of pilots from the time they enter Respondent's program until they complete training and are assigned a position. Tr. at 254. Mr. Santos assures that Respondent's training and certification program complies with FAA regulations, and he regularly corresponds with that agency on matters involving pilot training and certification. Id. Mr. Santos testified that Respondent's pilot training program is certified by FAA. Tr. at 262. Prior to his appointment as Director of Pilot Training, for approximately nine months, Mr. Santos was Respondent's Director of Safety. Id. In that position, he was responsible for assuring that flight operations complied with safety regulations and procedures. Tr. at 255. Mr. Santos is a licensed pilot, and has an airline transport rating as well as ratings for four separate aircraft. Id. He has logged over 13,000 hours as a pilot. Id.

Mr. Santos described the requirements for pilots who train in Respondent's pilot certification program:

After they're hired and given a class date, they go through approximately seven days of basic indoctrination training, which is, is just basic information on the airline, lots of forms to fill out, insurance, the other benefits. They receive security training, hazardous materials training, and some other various basic subjects, non-specific to the aircraft. That takes about seven days to finish all of that required training. Then they go off to what we call systems training, which is conducted over at Flight Safety International in Saint Louis, and that's, that's approximately 15 days of training for the specific operation of the aircraft that we, we offer. The last three days of that 15 days is what they call CPT or SIT, Situation Awareness Training, where they get to sit in front of a mock cockpit and go through the procedures that they have to apply once they get to the simulator. They're then put in the simulator. They're scheduled for eight simulator training sessions that the idea behind that is it's all on building blocks, session one, session two, and each session gets more difficult as the building blocks progress. By regulation, our program, they must complete all the maneuvers in our program within the specified time. If they do that, then they're given a proficiency check, and then the last simulator session is applying all that to a normal and an

abnormal line flight in the simulator. Final phase is they're put into initial operating experience, where they're required to obtain 25 hours or more of actual operating experience in an aircraft with passengers on our scheduled operation with a check pilot. And if they successfully complete all that, then their file is – their training file for the most part is complete and they're released for line duty.

Tr. at 256-257. Mr. Santos added that upon completion of the training phase, pilots must successfully complete an initial operating experience. Tr. at 258.

Mr. Santos testified that FAA regulations set forth the requirements for training pilots, including topics that must be taught. Tr. at 258. The regulations require that pilots be trained in simulators, and not in aircraft, but do not establish a minimum number of simulator sessions. Id. Mr. Santos stated that Respondent contracts with FSI to conduct simulator training for initial pilot training, paying a flat rate per pilot for the standard course. Tr. at 259. Respondent pays an hourly rate beyond that fee for any additional time spent by trainees in the simulator. Id. Mr. Santos stated that the simulator training schedules eight sessions followed by a proficiency check. Id. He stated that the eight simulator sessions cover “all the maneuvers we're required to accomplish in our program.” Tr. at 260. Mr. Santos said that candidates are not guaranteed a certain number of simulator sessions. Id. He further testified that there have been occasions where pilots were given two or three additional simulator sessions, but not for remedial training. Tr. at 268. Mr. Santos testified:

We, we put the students through this designed course with the assumption that they come to us with the skills needed to do the basic, the basic flight maneuvers in any type of airplane. We just teach them how to fly this particular aircraft following the guidance that's there, to handle all the procedures both normal and abnormal for the Embrauer.

Tr. at 268.

Mr. Santos testified that trainees are given a general operations manual, a pilot operating handbook, and a manual describing the procedures and systems specific to the aircraft that they are expected to fly. Tr. at 261. Students are not prohibited from using their own study materials. Mr. Santos testified that some of the material that Complainant gathered when compiling his study guides did not pertain to Respondent's systems, and some of the information was outdated. Tr. at 262.

Mr. Santos testified that instructors with FSI send him reports that document the performance of pilots during their training. Tr. at 265. He also communicates with instructors by e-mail and telephone. Id. Mr. Santos received reports and e-mails from FSI personnel that indicated Complainant was having trouble with some maneuvers during simulator sessions. Id. He testified that Mr. Gary's flight simulator training scores indicated to him that “he was having difficulty in some of the basic maneuvers, specifically instrument procedures and understanding of the systems and the functions of the systems to just procedures in the aircraft.” Tr. at 269. Mr. Santos explained that Complainant “was having difficulty after and during simulator session three, four. Through my conversations with Mr. Buzzel and Birch, after simulator session three,

and then again after simulator session four, it was determined based on the information they supplied me that he -- that Mr. Gary was going to need four to five more sessions just to bring him up to speed or to bring him up to where he should have been in the program after simulator session four." Tr. at 287. Mr. Santos stated that:

Based on the information that I received on his progress with the day prior simulator session three and simulator session four, and after inquiring how much additional training that Flight Safety felt he would need, Mr. Gary would need to bring him up-to-speed or to bring him to where he should have been, I just could not see us continuing to try to make this pilot into what we need as a proficient pilot at Chautauqua. So I decided that at that time we should probably just stop, stop the training.

Tr. at 288.

Mr. Santos testified that after he received the results of Complainant's fourth simulator session, he told Mr. Gary "that he wasn't progressing in the training, he had fallen behind, and we were just going to have to, to terminate the training at this point." Tr. at 289. He did not recall Complainant asking for another instructor to evaluate him. Id. Mr. Santos said that such evaluations are not part of the Respondent's program, and he was not aware of any FAA rule mandating them. Id. He recalled that about a week later Complainant asked him if he would reconsider, but Mr. Santos told Mr. Gary that his decision was final. Id. Mr. Santos stated that Mr. Gary was terminated with approximately 2 ½ weeks left in the training session. Tr. at 303.

Mr. Santos reviewed Complainant's pilot comparison data (CX-3) and testified that the information was not accurate. Tr. at 290. Mr. Santos disputed the record number of hours flown by other pilots in competition for jobs with Respondent. Tr. at 291.

Mr. Santos testified that he first became aware of Complainant's lawsuit against The Air Group in the spring of 2003. Tr. at 291. He said he learned of it from Respondent's HR (Human Relations) department. Id. Mr. Santos denied reviewing Complainant's background information or speaking with Rosa Moseley before he terminated Mr. Gary. Id. Mr. Santos testified that he has sole responsibility for the decision to terminate a pilot's training, and said he has done so at least 10 (ten) times and perhaps as many as 12 (twelve) times. Tr. at 302. In each instance, Mr. Santos relied upon the reports and correspondence produced by FSI in making his decision to terminate trainees. Tr. at 292 through 302. Mr. Santos stated that none of the individuals that he terminated were provided an evaluation by another instructor. Id.

On cross-examination, Mr. Santos testified that he could not recall when he first received FSI's reports of Complainant's performance during simulator sessions, though he was certain that he received e-mail and spoke with FSI personnel sometime after the third and fourth simulator sessions. Tr. at 318-320. Mr. Santos stated that in addition to reviewing the information about Complainant's performance, he reviewed his resume. Tr. at 341, 342. Mr. Santos said that he keeps a separate file of information on every trainee that includes resumes, and denied looking at Complainant's personnel file before deciding to terminate his training. Tr. at 363 through 365.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The employee protection provisions of AIR 21 are set forth at 49 U.S.C. § 42121. Subsection (a) prohibits discrimination against airline employees as follows:

No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a); *see also* 29 C.F.R. § 1979.102(b)(1)-(4).

The whistleblower provision set forth in the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, contains the same burden of proof standards as those included in the AIR 21 Act. As currently established under the ERA and the Act, during OSHA's initial investigative process a complainant must establish a *prima facie* case demonstrating that his or her protected activity was a contributing factor in the unfavorable personnel action indicated in their complaint. *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999). The elements of the *prima facie* case are as follows:

- (i). [t]he employee engaged in a protected activity or conduct;
- (ii.) [t]he [employer] knew, actually or constructively, that the employee engaged in the protected activity;
- (iii.) [t]he employee suffered an unfavorable personnel action; and

- (iv.) [t]he circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

29 C.F.R. 1979.104(b)(1)(i-iv). The investigatory process cannot proceed without the establishment of the *prima facie* case. However, even if a *prima facie* case has been established the investigation will not proceed if the employer can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action even in the absence of the employee's protected behavior. *Id.* at 1101.

At the level of a formal hearing before an administrative law judge, the complainant must prove the same elements as required for the *prima facie* case, with the exception that complainant must prove them by a preponderance of the evidence and not by mere inference. *Trimmer*, 174 F.3d at 1101-02; *see also Dysert v. Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997). Only if the complainant meets his burden does the burden shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. *Trimmer* at 1102. When established, the elements create an inference of unlawful discrimination. *Id.*

A factor that is "contributing" has been interpreted to include any factor that has the tendency to influence the decision in question. *Marano v. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993). The complainant is not required to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action. *Id.*

Once the complainant has established by a preponderance of the evidence that the protected activity was likely a contributing factor in the adverse action, the burden shifts to the respondent. In order to rebut the inference established by the *prima facie* case, the respondent must demonstrate by clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected activity. 29 C.F.R. § 1979.104(c). In other words, the respondent must demonstrate by clear and convincing evidence that its motivation in undertaking the adverse action against complainant was legitimate. *See Yule v. Burns Int'l. Security Service*, Case No. 1993-ERA-12 (Sec'y May 24, 1995).

Although "clear and convincing" has not been defined with precision, courts have held that as an evidentiary standard it requires a burden higher than "preponderance of the evidence" but lower than "beyond a reasonable doubt." *Id.* If respondent is able to meet this burden, the inference of discrimination is rebutted. To prevail, the complainant must then show that the rationale offered by the respondent was pretextual, i.e. not the actual motivation. *Overall v. Tennessee Valley Auth.*, Case No. 1997-ERA-53 at 13. As the Supreme Court noted in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), a rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination. *See also Blow v. City of San Antonio*, 236 F.3d 293, 297 (5th Cir. 2001).

As the Supreme Court observed in *United States Postal Serv. v. Aikens*, 460 U.S. 709 (1983):

Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The [court] has before it all the evidence it needs to decide the [ultimate question of discrimination]. 460 U.S. at 713-14, 715.

More recently, the U.S. Court of Appeals for the Eighth Circuit in *Carroll v. U.S. Department of Labor*, 78 F.3d 352, 356 (8th Cir. 1996), *aff'g Carroll v. Bechtel Power Corp.*, Case No. 1991-ERA-46 (Sec'y Feb. 15, 1995) observed:

But once the employer meets this burden of production, "the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). The presumption ceases to be relevant and falls out of the case. The onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reasons for the challenged employment action and the ultimate burden of persuasion remains with the complainant at all times. *Burdine*, 450 U.S. at 253, 256.

At that point, the fact that a Complainant has established a *prima facie* case becomes irrelevant at that point. Rather, the relevant inquiry becomes whether Complainant has proven by a preponderance of the evidence that Respondent retaliated against him for engaging in a protected activity. *Carroll* at 356.

Accordingly, my review begins with determining whether in fact Complainant has established the elements of a *prima facie* case of discrimination.

1) Complainant established that he engaged in protected activity

A protected activity occurs when an employee:

"(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under [the Act] or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under [the Act] or any other law of the United States..."

49 U.S.C. § 42121; *see also*, 29 C.F.R. §§ 1979.102. Title 14 of the CFR, relating to aeronautics and space, states that "[t]he person approving or disapproving for return to service an

aircraft...shall make an entry in the maintenance record of that equipment..." 14 C.F.R. §43.11(a). Further, 14 C.F.R. §43.12 provides that:

(a) [n]o person may make or cause to be made:

(1) Any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part...

14 C.F.R. §43.12(a).

"While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event." *Leach v. Basin 3Western, Inc.*, ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003), citing *Clean Harbors Envtl. Serv. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998). Although it does not matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations." *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. The alleged act must implicate safety definitively and specifically. The complainant's concern must at least "touch on" the subject matter of the related statute. *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). Additionally, the standard involves an objective assessment. The subjective belief of the complainant is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997).

In the instant matter, Complainant alleges that he engaged in protected activity by filing a lawsuit against his former employer, The Air Group, under what he believes is called "the New Jersey Conscientious Employee Protection Act". Complainant testified that while employed at The Air Group as a first officer, he was assigned to fly with a captain whom he believed demonstrated a weak "grasp of the airplane systems and ...airspace in the New York area and regulations..." Tr. at 84-85. Mr. Gary stated that he was concerned for his safety and that of passengers, and he believed it appropriate to express his concerns to his immediate supervisor. Id. Complainant contacted The Air Group's chief pilot in California, and shared his concerns with that individual. Id. Complainant asserted that before the day ended, the chief pilot called him and told him that his employment contract was terminated. Id. When Complainant asked for the reasons for the termination, he was told that they could not be discussed. Id. Thereafter, Complainant filed a lawsuit against The Air Group, alleging violations of whistleblower protection. Tr. at 87.

In ERA cases, internal complaints made to company supervisors concerning safety and quality control have been held to be protected activities. See *Bassett v. Niagara Mohawk Power Corp.*, Case No. 1985-ERA-34 (Sec'y Sept. 28, 1993). Because of the statutory connection between cases under ERA and AIR 21 Act, I find that holding pertinent to the instant matter, and conclude that a report such as Complainant's report to his chief pilot could constitute a protected activity. However, the evidence before me does not establish with enough specificity that Complainant's report meets the statutory and regulatory definition of a protected activity. Complainant testified generally that he had concerns about another pilot's ability to fly safely,

but he did not invoke a specific order, regulation or standard of the FAA or any other federal law relating to air carrier safety or other law at all as the basis for his concerns. Nor did Complainant describe the behavior of the individual so that an inference regarding the other pilot's ability to comply with safety regulations could be drawn.⁴ None of Complainant's pleadings before OALJ describe the safety violations that sparked his complaint to his supervisor at the Air Group.

I have made a careful review of the record in an attempt to "flesh out" Complainant's allegations of the safety considerations he raised with The Air Group. In his initial complaint with OSHA, sent by e-mail on April 16, 2003, Complainant does not specify the nature of his lawsuit against The Air Group. Complainant wrote: "[s]ince I have a lawsuit against one of my previous employers, The Air Group, I suspect the reason for my termination on the part of Chautauqua Airlines was because they found out about the above mentioned lawsuit". At the hearing, Complainant testified that during his interview with Ms. Moseley in November, 2002, he told her that he had a case pending against The Air Group: "I brought it to her attention that I had this case pending, and that I had been terminated by the Air Group. Her response was basically that we will be in touch and we'll check on it." Tr. at 108. Upon cross-examination, Complainant stated: "[s]o I told [Ms. Moseley], I said basically I have a whistle-blowing lawsuit. I've been terminated by the Air Group, and it was -- employment agreement, and they terminated my agreement with them. And she said, we'll be in touch. I'll check into it." Tr. at 154. Complainant admitted that he did not describe the exact nature of his lawsuit: He said: "I mentioned it to Rosa Moseley...I didn't talk about it. I mentioned it." Tr. at 191.

Notwithstanding the sparse record regarding the content of Mr. Gary's complaint against The Air Group, I find credible his testimony that it involved whistle-blowing. Complainant cited a New Jersey whistle-blower protection statute as the foundation for his original civil complaint that was subsequently removed to federal court. Although Complainant did not move into evidence any of the pleadings related to his civil action, I undertook a search of the state and federal court dockets through Westlaw and verified that Complainant had indeed filed a suit. I infer from the removal of the suit to federal court that the state court recognized that the whistle blower protection provisions of the Airline Deregulation Act pre-empt state law. See, 49 U.S.C. § 41713. Accordingly, I conclude that Complainant's pleadings before the state court were sufficient to imply protected activity. The filing of a complaint or charge of retaliation because of safety and quality control activities is protected activity under 49 U.S.C. § 42121(a)(1)-(4), see, *Kinser v. Mesaba Aviation, Inc.*, 2003-AIR-7 (ALJ Feb. 9, 2004). I further find that the filing of Complainant's suit pre-dates his employment with Respondent.

Based on the foregoing, I conclude that Complainant has established, by a preponderance of the evidence, that his civil action against The Air Group is a protected activity under the Act.

2) Complainant suffered an adverse employment action

To show the existence of an adverse employment action, Complainant must demonstrate by a preponderance of the evidence that an action taken against him had some adverse impact on his employment. See *Trimmer*, 174 F.3d at 1103 (citing *Montandon v. Farmland Indus., Inc.*,

⁴ For example, it would be obvious that Complainant's observation of another pilot's intoxication would be sufficient for the court to infer that safety was at issue.

116 F.3d 355, 359 (8th Cir. 1997)). Whistleblower regulations define discrimination or adverse employment action very broadly. *See* 29 C.F.R. 24.2(b) ("Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has [engaged in protected activity]"). The Act provides that an employer may not "discharge . . . or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment..." as a result of the employee engaging in protected activity. 49 U.S.C. § 42121(a); *see also* 29 C.F.R. § 1979.102(a). Activities that have been found to be adverse employment actions include, but are not limited to, elimination of position, threats of termination, blacklisting, causing embarrassment and humiliation, constructive discharge, and issuance of disciplinary letters.

It is undisputed that Respondent is an employer subject to the Act. It is undisputed that Respondent employed Complainant subject to completion of training. It is further undisputed that Respondent terminated Complainant's training and eliminated his employment. Therefore, I find that Complainant has established that Respondent took an adverse employment action against him.

3) Respondent was not aware of Complainant's alleged protected activity

The Secretary has held that knowledge of a complainant's protected activity on the part of the alleged discriminatory official is an essential element of a complainant's case. *Martin v. Akzo Nobel Chemicals, Inc.*, 2001-CAA-00016 (ALJ December 20, 2001), aff'd, ARB 02-031 (July 31, 2003), citing *Bartlick v. TVA*, Case No. 88-ERZ-15, Sec. Ord., Dec. 6, 1991, slip op at 7 n. 7 and Sec. Ord. Apr. 7, 1993, slip op. at 4 n.1, aff'd, 73 F.3d 100 (6th Cir. 1996). Complainant must show that Santos had actual or constructive knowledge of his alleged protected activity at the time he terminated him from Chautauqua's training and certification program. *Moseley v. Carolina Power & Light*, 94-ERA-23 (ARB Aug. 23, 1996); *Ford v. Northwest Airlines, Inc.*, 2002-AIR-21 (ALJ May 15, 2003). The evidence must show that an employee of the respondent with the authority to take the action complained about had knowledge of the protected activity. Id.

On this issue, I find that Complainant has failed to establish that Santos knew about Complainant's civil action against The Air Group when he made the decision to terminate Mr. Gary's training. Complainant testified that he did not raise the issue regarding his civil complaint against the Air Group when he spoke with Mr. Santos about his termination, and that he personally raised the issue for the first time in his complaint with OSHA. Tr. at 195. Complainant admitted to telling only Ms. Moseley that he had filed a suit against The Air Group. Complainant's complaint with OSHA states that he "suspected" that Respondent became aware of his suit against The Air Group when, in conjunction with a background investigation, that company informed Respondent that Complainant had been terminated.

I find that the testimony of Respondent's employees credibly demonstrates that Respondent, and particularly, Mr. Santos, had neither actual nor constructive knowledge of Complainant's protected activity. In weighing the credibility of witnesses, I must consider the relationship of the witness to the parties, the witness' interest in the outcome of the case, the

witness' demeanor, the witness' opportunity to observe the subject matter of the testimony and the degree to which the witness' testimony is supported or refuted by other evidence. *Martin v. Akzo Nobel Chemicals*, BRB at 3 *supra*.

Ms. Moseley credibly testified that she did not make any calls to The Air Group, or any other company, regarding the information gleaned by Stadler in its background investigation of Complainant. Tr. at 213, 239. She stated that she reviewed Mr. Gary's background investigation documents but did not recall seeing that he had been terminated by The Air Group. Tr. at 239. She said that she received the background information sometime after January 10, 2003, and filed it in Complainant's personnel file. Tr. at 239. She discussed the information with no one. This testimony is supported by the documents returned by The Air Group. RX-1. Although a statement reflecting that Complainant was terminated is checked off in one document, the documents do not refer to Mr. Gary's lawsuit, nor do they describe the reason for his termination from The Air Group in any detail. RX-1. Ms. Moseley testified that she said nothing to Mr. Santos about Mr. Gary's background investigation. Tr. at 217. This is consistent with her testimony that she did not recall seeing anything negative on Complainant's background investigation documents.

Ms. Moseley's testimony about her actions with respect to Complainant's background information is also consistent with her testimony that she first learned of Mr. Gary's lawsuit when he filed his complaint against Respondent with OSHA. Tr. at 218. Ms. Moseley denied that Complainant had told her about his lawsuit at his interview. Tr. at 216-217. She was certain that she would have remembered mention of this lawsuit, and said that she would have notated it on notes she made contemporaneously with the interview. *Id.* I find it reasonable to believe that had Mr. Gary put her on notice of a problem with a prior employer, Ms. Moseley would have been alert for confirmation of the problem. Instead, Ms. Moseley filed Mr. Gary's background information in much the same way she files every other trainee's information. She did not look further into Complainant's background, despite the negative comments from The Air Group, and despite FAA rules require inquiry into negative pilot background.

I find Complainant's testimony that he told Ms. Moseley about his whistle-blowing lawsuit and termination from The Air Group less credible. It is troubling that Complainant admittedly did not divulge this information until the hearing before me. Tr. at 156. Moreover, the assertion contradicts Complainant's statements in his complaint with OSHA, and in pleadings before me. It is inconsistent with his theory that Respondent retaliated against him for bringing a suit against The Air Group. It makes no sense to accept that Respondent would have invested resources to hire and train Complainant, only to terminate him for his protected activity mid way through his training.

I find credible Santos' testimony that he has sole responsibility for making decisions regarding terminating an individual's pilot training. Tr. at 292. I find that Gary Santos credibly testified that he had no knowledge of Complainant's protected activity before receiving notice of his complaint with OSHA. Tr. at 290-293. Although he spoke with Complainant about his termination from the training program, Complainant did not tell him about his protected activity. Tr. at 294. This is consistent with Complainant's testimony, wherein he admitted saying nothing to Mr. Santos about his civil action against The Air Group. Mr. Santos denied speaking with Ms.

Moseley about the results of the background investigation conducted by Stadler, and denied seeing The Air Group's information regarding Mr. Gary before he decided to terminate Mr. Gary from the training program. Tr. at 293.

I find that neither Santos nor Moseley, nor any other employee of Chautaugua with input in the decision to terminate Mr. Gary had knowledge of his protected activity when the decision to terminate his training was made.

Complainant has proven by a preponderance of the evidence that he engaged in protected activity under the Act and that Respondent took adverse action against him. However, because I find that Respondent had no knowledge of Complainant's protected activity when it took adverse action against him, I need not consider whether his protected activity was a contributing factor in that action. *See* 49 U.S.C. §42121(b)(2)(B)(iii); 42 U.S.C. §5851(b)(3)(C).

CONCLUSION

Complainant has failed to prove that any employee of Chautaugua that was involved in the decision to terminate his training had any knowledge that he had engaged in protected activity. Therefore, Complainant has failed to prove the essential elements of his case, and I find further analysis unnecessary. Accordingly, I find that Respondent did not violate the employee protection provisions of the Act.

ORDER

It is recommended that the complaint of Ray Gary against Chautaugua Airlines under the Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 be DISMISSED WITH PREJUDICE.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be

filed within fifteen (15) business days of the date of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the decision of the administrative law judge shall become the final order of the Secretary unless the Board, within thirty (30) days of the filing of the petition, issues an order notifying the parties that the case have been accepted for review. If a case is accepted for review, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington,